Supreme Court, U.S.
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No. 02-798 (3)

In The

Supreme Court of the United States

FABRI-CENTERS OF AMERICA, INC.,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

HARLEY M. KASTNER
KEITH L. PRYATEL*
KASTNER WESTMAN & WILKINS, LLC
3480 W. Market Street, Suite 300
Akron, OH 44333
(330) 867-9998

**Counsel of Record*

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

In order for this Court to side with the Secretary's briefed arguments it would have to hold:

- That when a federal circuit uses the word "any," it really means "some, but certainly not all." *See* Sect'y Brief in Opposition ("Opp.") at p. 12 ("It is highly doubtful that by using the phrase 'toward any overtime compensation due,' the court of appeals meant to rule that premium pay can be credited under an aggregate as opposed to work-period method");

- Congress' use of "shall" within a statute more properly connotes "maybe, but not necessarily." *But see, National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (Congress' use of "shall" necessarily creates a right ". . . impervious to judicial discretion"); and

- This Court's decisions about how statutes are to be applied, read, and interpreted can be cast aside by simply distinguishing the particulars of the subject matter that spawned those opinions. *See*, Opp. at p. 23 ("*Christensen* addressed whether 'the FLSA . . . prohibits a State or subdivision thereof from compelling employees to utilize accrued compensatory time.' The use of compensatory time is not at issue here"). *But see, Christensen v. Harris Cty., Texas*, 529 U.S. 576, 588 (2000) ("Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that [the employer] has violated the FLSA. And the FLSA contains no such prohibition").

Because these propositions are nothing short of astonishing, and all clearly wrong, the writ for certiorari should be granted.

The Secretary, like Petitioner, apparently concurs that the Sixth Circuit's published opinion is fraught with error. Opp. p. 9. While Petitioner challenges the correctness of the Sixth Circuit's statutory analysis and conclusions under the Fair Labor Standards Act ("FLSA"), the Secretary professes that the panel erred in declaring that there exists "divergent [circuit] case law" under 29 U.S.C. § 207(h). *Id.* As the Secretary necessarily concedes, both the majority and dissenting opinions of the Sixth Circuit announced that there does indeed exist circuit conflict over the proper interpretation and application of § 207(h), and that employers doing business in those conflicted circuits are free to apply and utilize the overtime compensation credits in a manner now prohibited only by the Seventh and Sixth Circuits. *See*, App. 19-20a, 26a (Clay, J., majority; Siler, SCJ., dissenting).[1] The Secretary's parsing of the identified circuit conflicts in *Alexander v. United States*, 32 F.3d 1571 (Fed. Cir. 1994) and *Kolheim v. Glynn County, Ga.*, 915 F.2d 1473 (11th Cir. 1990) (Opp. at pp. 8-14) misses the mark because it does nothing to eliminate the perception that circuit conflict does indeed exist. Whether

[1] The Secretary has no apparent quarrel with the fact that if indeed a circuit conflict exists with respect to application of § 207(h), that the dispute is one that should be settled by this Court in light of the national uniformity required of the FLSA. Nor does the Secretary dispute that the underlying nature of the issue presented in this petition – employer remittance of non-FLSA required premiums – is necessarily a recurring one in light of the several state statutes that compel such payments.

right or wrong, the Sixth Circuit sanctioned alternative FLSA pay practices by the federal government and employers doing business in the states of Georgia, Florida and Alabama. App. 19-20a.

Moreover, Respondent is wrong to suggest that no circuit conflict exists under § 207(h). While the Secretary charges that: "It is highly doubtful that, by using the phrase 'toward any overtime compensation due,' the court of appeals [in *Alexander*] meant to rule that premium pay can be credited under an aggregate as opposed to work-period method" (Opp. p. 12), she later concedes just that point (Opp. at p. 19). To prop up her Congressional amendment straw man, the Secretary is forced to concede the original section 207(h), and its "toward *any* [FLSA] premium compensation due" proviso was highly suggestive of a crediting right un-cabined by workweek or work period qualifiers. Opp. p. 19. Like the Secretary, the Sixth Circuit similarly felt that "any" means just that. App. 13a. Accordingly, both the majority and dissenting opinions below were quite correct in announcing that their opinion and that of the Seventh Circuit in *Howard v. City of Springfield*, 274 F.3d 1141 (7th Cir. 2001) represent "divergent case law" in an area where there is "silence in the statute" and a "lack of an implementing [administrative] regulation." App. 19a.

The Secretary is equally wrong in proclaiming that her construction of the FLSA ". . . is strongly supported by the text and structure of the Act." Opp. p. 15. The Secretary's brief is conspicuous in its failure to even mention the obligatory "shall" which appears in the text of section 207(h):

> Extra compensation paid as described in paragraphs (5), (6) and (7) of subsection (e) of this section *shall be creditable* toward overtime compensation payable pursuant to this section.

29 U.S.C. § 207(h)(2), Pub. L. 393 (1949) (emphasis added). Whatever interpretive maxims are summoned forth by the Secretary, or whatever tortured meanings are ascribed to the words "paid," "creditable," and "payable," the Secretary's construction necessarily leads to a result wherein the compulsory "shall" is morphed into "shall not." If an employer's remitted premiums exceed the workweek's FLSA obligations for an employee, they then "shall not" be creditable under § 207(h). By the same token, if the worker does not engage in FLSA overtime within a workweek, remitted premiums "shall not" be creditable at all. *But see, Barnhart v. Peabody Coal Co.*, 123 S.Ct. 748 (2003) (THOMAS, J., dissenting) ("If Congress desires for this Court to give 'shall' a non-mandatory meaning, it must say so explicitly by specifying the consequences for non-compliance or explicitly defining the term 'shall' to mean something other than a mandatory directive"). *See also, National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (Congress' use of "shall" is best understood to create a right ". . . impervious to judicial discretion").

The Secretary also ignores the statute's past tense "paid." Because premiums are not "paid" until actually received, they logically and practically cannot be offset only against FLSA overtime earnings included in the same paycheck. Once the employee possesses premium pay, it can only be truly offset through subsequent paychecks, remitted for later occurring workweeks. Nor does Respondent explain why Congress would use "paid" in reference to offsetable premiums, but "payable" in reference to

overtime pay, if it meant to connote the very same concept: "[Amounts] *currently* owed or due;" "sums presently due." Opp. p. 20. *But see*, *Scott v. Brink's, Inc.*, 962 F.2d 225, 227 (2nd Cir. 1992) ("In common usage 'paid' does not mean 'payable'").

The Secretary's parade of "serious abuses" and "significant anomalies" (Opp. p. 20) is the same type of erroneous, misguided, Henny-Penny rationale invoked by the Seventh Circuit majority to bolster the fractured decision in *Howard v. City of Springfield*, 274 F.3d 1141, 1149 (7th Cir. 2001). The short answer to all of this is that the hypothetical "abuses" are plainly unobtainable under the FLSA. An employer cannot ". . . withhold [ ] FLSA overtime payments earned by employees for an extended period of time – months or even years – and then seek [ ] to offset against the FLSA overtime liability any contractual premiums paid during that extended period." Opp. p. 20. As the Secretary herself notes (Opp. p. 20), and as the FLSA statute makes quite clear, such an imaginary scenario is "unlawful." *See also*, 29 U.S.C. § 207(a)(1); 29 C.F.R. § 778.106. Rather, the only result that an employer could obtain while operating under the *Kolheim* and *Alexander* approaches to section 207(h) is a fronting or advancement of extra compensation premiums to employees subject to subsequent overtime crediting. Holding off the remittance of workweek or work period FLSA overtime payments in contemplation of future occurring premiums is plainly illegal, and no one has suggested otherwise.

To the extent the Secretary now posits that she has always held a "consistent and informed position" with respect to crediting under § 207(h) (Opp. p. 17), Petitioner would point out that this bedrock of self-generated administrative precedent was not once cited or referenced

to the District Court by the Secretary or her counsels. The dusty opinion letters to which some measure of judicial deference is now urged were not even unearthed by the Secretary until this dispute was briefed to the Sixth Circuit panel. Moreover, the Secretary's purportedly "long-held" opinion letters are completely barren of any articulated rationale or reasoning.[2] Rather, they represent nothing short of an edict, unadorned by logic or analysis, which under this Court's teachings warrant no deference whatsoever, be it *Skidmore*[3] or *Chevron*.[4] *See, United States v. Mead Corp.*, 533 U.S. 218 (2001) (agency opinion letters with "little or no reasoning" warrant no deference). *See also, General Electric Corp. v. Gilbert*, 429 U.S. 125, 142 (1976) (courts look hard at the "'thoroughness evidenced in [the agency's] consideration'").

The Secretary's argument that other ". . . provisions of the FLSA make clear that the workweek or work period is the applicable period" (Opp. p. 15) proves too much. Congress surely knows how to limit FLSA requirements by a "workweek" or "work period." As the Secretary correctly notes, the statute is replete with such examples. Opp. p. 15. Thus, the Sixth Circuit was quite right to point out: "[W]here Congress includes particular language in one

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[2] The opinion letters tardily located by the Secretary are Wage-Hour Op. Letter WH-526 (1985); Wage-Hour Op. Letter WH-537 (1966); and Wage-Hour Op. Letter WH-540 (1966). To the extent these letters even remotely touch upon permissible crediting under section 207(h), they offer no rationale, and are thus void of any "power to persuade." *Christensen v. Harris Cty., Texas*, 529 U.S. 576, 587 (2000).

[3] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[4] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." App. 15a (quoting, *Russello v. United States*, 464 U.S. 16, 23-24 (1983)). *Accord, Marshall v. Western Union Tele. Co.*, 621 F.2d 1246, 1251 (3rd Cir. 1980) ("The careful inclusion of the workweek standard in one subsection of the [FLSA] and its exclusion in the other . . . indicates the exclusion was intentional. Under the usual canons of statutory construction, where Congress . . . has carefully employed a term in one place and excluded it in another, it should not be implied where excluded"). Unlike other FLSA sections, section 207(h) contains no workweek or work period qualifiers.

Finally, the Secretary's treatment of *Christensen v. Harris Cty., Texas*, 529 U.S. 576 (2000) (Opp. at p. 23) is both superficial and frankly a bit naive. It is true that *Christensen* directly implicated the "use of compensatory time" under the FLSA, and also true that compensatory time "is not at issue here." *Id.* But *Christensen* also pointed out that for decades the Secretary has been misreading how the FLSA operates, and how it is to be applied. *Christensen*, 529 U.S. at 588. Instead of employers having to exhaustively pick apart the statute to find justification for their actions, it is the Secretary who must be able to cite to a particular statutory prohibition. *Christensen v. Harris Cty., Texas*, 529 U.S. 576, 588 (2000) ("Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that [the employer] has violated the FLSA. And the FLSA contains no such prohibition"). The Secretary's cursory treatment of *Christensen* here only confirms her intent to continue to read the FLSA

"exactly backwards,"[5] notwithstanding this Court's contrary directive.

Christensen has been invoked far outside the "compensatory time" setting to which the Secretary would banish its principles. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (EEO principles under Title VII); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (Customs Service regulations); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2000) (EPA setting); *League of Wilderness Def. v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (Forest Service setting); *South Shore Hosp. v. Thompson*, 308 F.3d 91 (1st Cir. 2002) (Medicare setting). Here, Petitioner seeks only to apply *Christensen's* rationale to the same FLSA statute in which it had its origins. And, this would not be the first time that an administrative agency struggled to avoid this Court's rulings by disingenuously pruning the reach of one of its opinions. *See, NLRB v. Kentucky River Comm. Care, Inc.*, 532 U.S. 706, 716 (2001) ("The Board's [interpretation] . . . is particularly troubling because just seven years ago we rejected the Board's interpretation").

In the end, this petition poses a question of pure statutory construction, against an undisputed factual background, with respect to a statutory provision that has been in existence for more than fifty years without the benefit of this Court's counsel, in an area of federal law that is now experiencing litigation explosion. Tnat the appellate panel confirmed the existence of circuit conflict, and ignored several broad-based interpretive canons and

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[5] *Christensen v. Harris Cty, Texas*, 529 U.S. 576, 588 (2000).

FLSA substantive decisions by this Court only further heightens the need for certiorari.

For the foregoing reasons, and those set forth in the petition, a petition for writ of certiorari should be granted.

Respectfully submitted,

HARLEY M. KASTNER
KEITH L. PRYATEL*
KASTNER WESTMAN & WILKINS, LLC
3480 W. Market Street, Suite 300
Akron, OH 44333
(330) 867-9998
*Counsel of Record

Counsel for Petitioner